



**Destiny Hauliers Limited & 2 others v Heritage Insurance Company Limited & 2 others (Civil Suit E063 of 2022) [2024] KEHC 10327 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 10327 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E063 OF 2022  
F WANGARI, J  
APRIL 26, 2024**

**BETWEEN**

**DESTINY HAULIERS LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
KUTUB ABDI OSMAN ..... 2<sup>ND</sup> PLAINTIFF  
NUR ABDULLE MOHAMED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**HERITAGE INSURANCE COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT  
INSURANCE REGULATORY AUTHORITY ..... 2<sup>ND</sup> DEFENDANT  
KENYA BROADCASTING AUTHORITY ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The ruling relates to a Notice of Preliminary Objection by the 1<sup>st</sup> Defendant dated 23<sup>rd</sup> October, 2023. The Preliminary Objection is premised on the following grounds:
  - a. That the cause of action herein allegedly occurred on the 13<sup>th</sup> December, 2015.
  - b. That the cause of action herein is premised on an alleged breach of contract and was filed after the 23<sup>rd</sup> September, 2022.
  - c. That by virtue of section 4 of the *Limitation of Actions Act* Cap.22 Laws of Kenya, the cause ought to have been judged within 6 years of its occurrence, and therefore by 14<sup>th</sup> December, 2021.
  - d. That the law does not brook nor envision or provide for extension of time for causes premised on breach of contract.



- e. That the suit is duplicate of Mombasa CMCC No.474 of 2020 Destiny Hauliers Ltd v Heritage Insurance: and thus, should be struck out on account of duplicity.
2. Directions were taken that the Preliminary Objection be canvassed by way of written submissions. Both parties duly complied by filing submissions and cited various authorities in support of their rival positions.
3. I am grateful to Counsel for complying with the directions by filing detailed submissions and citing various authorities from this court and other superior courts to urge their respective positions. I appreciate their industry as the said submissions and authorities would go a long way in guiding the court in the determination of the Preliminary Objection one way or another.
4. The 1<sup>st</sup> defendant contends that the suit herein is time barred as the cause of action occurred on the 15<sup>th</sup> December, 2015 yet this suit was filed on the 23<sup>rd</sup> September, 2022. That the same being a claim for breach of contract, is time barred.
5. The plaintiff submits that the issues raised in the Preliminary Objection are issues of fact and not law and the preliminary objection therefore falls way below what is deemed as one.

### **Analysis and Determination**

6. I have duly considered the Preliminary Objection, submissions together with the authorities relied as well as the law and in my view, the following issues are for determination;
  - a. Whether the notice of preliminary objection is merited;
  - b. Who bears the costs?
7. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696. At page 700, Law, JA stated: -

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701, Sir Charles Newbold, P added: -

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

8. For a Preliminary Objection to succeed the following tests ought to be satisfied; Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit or application.



9. Section 4(1)(a) of the *Limitation of Actions Act* Cap.22 Laws of Kenya provides as follows:-

“The following action may not be brought after the end of six years from the date when the cause of action accrued...(a) actions found on contract.”

10. The cause of action occurred on the 15<sup>th</sup> December, 2015 and this suit was filed on 23<sup>rd</sup> September, 2022, 6 years and 9 months later. The plaintiff was time barred as at 16<sup>th</sup> December, 2021 as the Act does not envision a suit for breach of contract to be filed outside the period of 6 years.
11. Even though the Plaintiff submitted that the issue of the suit being time barred required further evidence, I find that there can be no other way of looking at a time barred suit, other than what it is, and the issue of limitation of time is a pure point of law. It is also not in dispute that the cause of action arose on 15<sup>th</sup> December, 2015 and the suit filed on 23<sup>rd</sup> September, 2022. I find that the tests to have a successful Preliminary Objection have been satisfied.
12. I need not belabor on the issue of whether this suit is a duplicity or not as the same was filed out of the stipulated time. The Preliminary Objection is thus upheld and the instant suit is struck out.
13. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. Having arrived at the conclusion that the current suit was filed out of time, I shall make no order as to costs.
14. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
  - a. The Notice of Preliminary Objection dated 23rd October, 2023 is merited and is hereby upheld.
  - b. Consequent to (a) above, the Plaint dated 23rd September, 2022 and filed on the same day are hereby struck out;
  - c. Each party to bear their own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 26<sup>TH</sup> DAY OF APRIL, 2024**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

Egunza Advocate for the Plaintiff

Amani Advocate for 1<sup>st</sup> Defendant

Barile, Court Assistant

